Supreme Court, U.S.
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No.

IN THE
SUPREME COURT OF THE UNITED STATES

WRIGHT ELECTRIC, INC.,

Petitioner,

v.

THOMAS A. OUELLETTE, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 292, AFL-CIO AND MICHAEL J. PRIEM,

Respondents.

On Petition For Writ of Certiorari To The Minnesota Court of Appeals

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PETITION FOR WRIT OF CERTIORARI

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March 14, 2005

QUESTIONS PRESENTED FOR REVIEW

1. Whether the state court of appeals erred in ruling that the National Labor Relations Act creates a protected right of employee applicants to lie on their employment applications with regard to their qualifications, a ruling that conflicts with holdings of the federal courts and the National Labor Relations Board. *NLRB v. Town & Country Electric, Inc.* 516 U.S. 85 (1995); *Hartman Brothers Heating & Air Conditioning, Inc. v. NLRB*, 280 F. 3d 1110 (7th Cir. 2002); *Winn-Dixie Stores, Inc.*, 236 NLRB 1547 (1978).

2. Whether the state court of appeals erred in ruling that the NLRA preempts all state tort law claims by employers against employee applicants who lie on their employment applications with regard to their qualifications, a ruling that conflicts with numerous federal court holdings regarding the scope of federal labor law preemption of state laws. *Int'l Longshoremen's Ass'n v. Davis*, 476 U.S. 380 (1986); *Belknap, Inc. v. Hale*, 463 U.S. 491 (1983); *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731 (1983); *Sears, Roebuck & Co. v. Carpenters*, 436 U.S. 180 (1978); *Farmer v. Carpenters*, 430 U.S. 290 (1977); *Linn v. Plant Guard Workers*, 383 U.S. 53 (1966).

LIST OF PARTIES TO PROCEEDINGS IN THE STATE COURTS AND CORPORATE DISCLOSURE STATEMENT

The Petitioner in this case is Wright Electric, Inc., a Minnesota corporation. Petitioner is not related to any other publicly held or publicly traded companies under Supreme Court Rule 29.6.

Respondents in this case are Thomas A. Ouellette, International Brotherhood of Electrical Workers, Local 292, AFL-CIO, and Michael J. Priem.

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PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The ruling of the Minnesota Court of Appeals as to which the writ is being sought is reported as *Wright Electric, Inc. v. Ouellette*, 686 N.W. 2d 313 (Minn. Ct. App. 2004) (App. 1a). The Order of the Supreme Court of Minnesota denying discretionary review of the court of appeals' ruling is reported at 2004 Minn. LEXIS 814. (App. 31a). A related decision of the U.S. Court of Appeals for the Eighth Circuit is reported as *Wright Electric, Inc. v. NLRB*, 200 F. 3d 1162 (8th Cir. 1999).

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257. A discretionary petition for review was denied by the Minnesota Supreme Court on December 14, 2004. (App. 31a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THIS CASE

United States Constitution, Art. VI, Clause 2 (Supremacy Clause)

United States Constitution, First Amendment

29 U.S.C. § 157

29 U.S.C. § 158(a)(1) and (3)

All are set forth in the Appendix to this Petition.

STATEMENT OF THE CASE

Wright Electric is a non-union electrical contractor headquartered in Plymouth, Minnesota. In 1992, Thomas A. Ouellette ("Ouellette") applied for a position with the Company. On his application, he made a series of false statements and deliberate omissions relating directly to his qualifications for the position.

Among other acts of fraud, Ouellette concealed that he had performed electrical work without a permit in violation of state law, that he had resigned without notice from a prior employer with whom he claimed to still be employed, that he had intentionally broken company materials at another previous workplace, and that he had engaged in workplace misconduct rendering him ineligible for

rehire at yet another undisclosed place of employment. In total, Ouellette falsified his employment record to conceal five other employers.

After hiring him, Wright learned of Ouellette's apparent fraud in the application process and, consistent with its established policies, terminated him. International Brotherhood of Electrical Workers, Local 292, AFL-CIO ("Local 292") filed an unfair labor practice charge with the National Labor Relations Board ("Board"), claiming that Ouellette had been terminated because of union organizing activities in violation of the National Labor Relations Act (the "Act" or the "NLRA"). The Board's General Counsel refused to issue a complaint and dismissed the charge, concluding that there was insufficient evidence to find that Wright had terminated Ouellette for anything other than falsifying his employment application.

In 1993, Wright Electric brought suit in state court against Ouellette, Local 292, and the Local's Business Agent, Priem. Wright Electric's complaint set forth common law claims based upon Respondents' fraud, and sought monetary and injunctive relief. Based upon Wright Electric's showing under Minnesota Statutes sections 549.191 and 549.20, the district court judge granted Wright Electric leave to amend its complaint to seek punitive damages.

In the meantime, Local 292 filed new unfair labor practice charges with the Board, contending that limited aspects of the lawsuit and certain discovery requests promulgated by Wright violated the NLRA. The new charges were addressed by the Board and the Eighth Circuit Court of Appeals. Each of these

authorities allowed Wright's state court lawsuit to proceed ahead, with no finding of NLRA preemption as to Wright's fraud claims. *See Wright Elec., Inc. v. NLRB*, 200 F. 3d 1162 (8th Cir. 1999).

In August 2003, however, Respondents brought a motion for summary judgment in the state court proceeding, contending, among other things, that Wright Electric's state law fraud and related claims were preempted by the NLRA. (App. 11a). In September 2003, the district court denied Respondents' motion, finding no preemption, but Respondents appealed. (*Id.*). On September 14, 2004, the Minnesota Court of Appeals reversed, holding that Wright Electric's lawsuit was preempted under the Act. (*Id.*).[1]

The state court of appeals held that Ouellette's misrepresentations were "arguably protected" under the NLRA, and that the state courts could not exercise jurisdiction over Wright Electric's claims. The court mistakenly relied upon two cases in which the NLRB had found employers in violation of the Act for refusing to employ union organizers who lied on their employment applications about previous union activity. *Winn-Dixie Stores, Inc.*, 236 NLRB No. 204 (1978) and *Hartman Brothers Heating v. NLRB*, 280 F.3d 1110 (7th Cir. 2002). According to the state court of appeals: "Based on the NLRB and Seventh Circuit decisions, if Ouellette lied on his application

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[1] Pursuant to this Court's Rule 14.1(g), Petitioner hereby states that the federal question sought to be reviewed was first explicitly raised by Respondents in the manner set forth above, as described in the attached opinion of the Minnesota Court of Appeals. (App. 11a). A dispute exists as to whether this federal question was also implicitly raised in the earlier, related decision of *Wright Electric, Inc. v. NLRB*, 200 F. 3d 1162 (8th Cir. 1999).

to hide his union affiliation and status as a "salt," then Wright Electric's claims are preempted by the NLRA." (App. 24a).

In this regard, the state court of appeals relied heavily on language in this Court's opinion in *Int'l Longshoremen's Ass'n v. Davis*, 476 U.S. 380 (1986), though the Court in that case had found *no* preemption of state law. The state court declared that preemption was compelled by *Int'l Longshoremen's Ass'n*, if the Respondents "put forth enough evidence to enable [this] court to find that the [NLRB] reasonably could uphold a claim based on such an interpretation." (Though in the present case, the NLRB had already declined to uphold any unfair labor practice claim regarding Ouellette's misrepresentations.).

The state court of appeals failed to address any of this Court's decisions disavowing federal labor law preemption of state tort laws of general application, including particularly those laws that are deeply rooted in state common law and traditions. *See Belknap, Inc. v. Hale*, 463 U.S. 491 (1983); *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731 (1983); *Sears, Roebuck & Co. v. Carpenters*, 436 U.S. 180 (1978); *Farmer v. Carpenters*, 430 U.S. 290 (1977); *Linn v. Plant Guard Workers*, 383 U.S. 53 (1966).

Nevertheless, the state court concluded that a finding of preemption was compelled in this case, holding as follows:

> As the law now stands, an applicant/salt may permissibly falsify his application and thereby hide negative,

> relevant aspects of his qualifications (even past misconduct), if the past misconduct with non-union employers happened to occur during the same time that the applicant/salt was also engaged in protected union activities. In such cases, we believe a salt has met the minimal burden of demonstrating that falsifying an application by omitting any reference to the employer in question is "arguably protected" under the NLRA. *Until the NLRB or the United States Supreme Court addresses this anomaly, the law compels the result that we reach here today.*

[emphasis supplied]. (App. 27a).

Wright's Petition for Review to the Minnesota Supreme Court was denied. (App. 32a). Wright now petitions this Court to address the anomaly identified by the Minnesota Court of Appeals by granting the Writ of Certiorari.

REASONS FOR ALLOWING THE WRIT

I. This Court's Intervention Is Required To Correct The Legal Anomaly Created By The State Court's Misapplication Of Federal Labor Law To False Statements On Employment Applications.

The state court's decision in this case rests upon the following misstatement of federal labor law:

> As the law now stands, an applicant/salt may permissibly falsify his application and thereby hide negative, relevant aspects of his qualifications (even past misconduct), if the past misconduct with non-union employers happened to occur during the same time that the applicant/salt was also engaged in protected union activities.

(App. 27a). From this false premise, the state court went on to hold that the undisputed falsehoods at issue in this case were "arguably protected" under the NLRA, and thus that the state courts could not exercise jurisdiction over Wright Electric's claims of fraud and related causes of action. The court itself characterized this outcome as an "anomaly" calling for resolution by this Court. (*Id.*).

As is further explained below, and contrary to the holding of the state court, no "right to lie" about employment qualifications under the NLRA has ever been countenanced by either this Court or any other

court, nor by the National Labor Relations Board. The state court of appeals has turned on its head this Court's preemption doctrine so as to needlessly preempt deeply rooted state common law remedies. Review should be granted to resolve numerous conflicts with the holdings of federal courts created by the state court decision.

A. Contrary To The State Court's View, Nothing In The NLRA Gives Employee Applicants The Right To Lie About Their Qualifications For Employment.

In *NLRB v. Town & Country Electric, Inc.*, 516 U.S. 85 (1995), this Court held that union agents seeking employment with non-union contractors fall within the definition of "employees" under the NLRA and cannot therefore be discriminated against based upon their support for unionization of an employer's workforce. Nothing in the Court's *Town & Country* decision, however, immunized union salts from disciplinary action or other remedies for misconduct engaged in before or after being hired. Rather, the Court declared that "other remedies" could be applied to any salts' misconduct, and that such misconduct would ***not*** be protected by the NLRA:

> A company faced with unlawful (or possibly unlawful) activity can discipline or dismiss the worker, file a complaint with the Board, or notify law enforcement authorities. *See, e.g., NLRB v. Electrical Workers*, 346 U.S. 464, 472-478 (1953); *Willmar Elec. Service v. NLRB*, 968 F.2d at 1330 (arsonist who is also

> union member is still an "employee," but may be discharged).

516 U.S. at 96.

In this regard, *Town & Country* maintained consistency with a long line of cases in which the Court has recognized that union activists lose the protections of the NLRA when they step outside the boundaries of legitimate organizing activities and engage in destructive or otherwise unlawful behavior violating settled norms in the workplace. *See NLRB v. Electrical Workers, supra,* 346 U.S. at 472. *See also, Linn v. Plant Guard Workers*, 383 U.S. 53, 63 (1966)(suits against unions for defamation not preempted); *Farmer v. Carpenters*, 430 U.S. 290, 302-3 (1977)(suit for intentional infliction of emotional distress); *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731 (1983)(trespass and defamation); *BE&K Construction Co. v. NLRB*, 536 U.S. 516 (2002)(antitrust lawsuit).

In the present case, the state court departed from the holding of *Town & Country* by declaring that union applicants have a protected right to engage in the unlawful activity of common law fraud, *i.e.,* by misrepresenting their claimed qualifications for employment during the application process. This holding conflicts not only with *Town & Country* itself but with the two cases on which the state court mistakenly relied: *Winn-Dixie Stores, Inc.*, 236 NLRB No. 204 (1978) and *Hartman Brothers Heating v. NLRB*, 280 F.3d 1110 (7th Cir. 2002).

According to the court of appeals: "Based on the NLRB and Seventh Circuit decisions, if Ouellette lied on his application to hide his union affiliation and

status as a "salt," then Wright Electric's claims are preempted by the NLRA." (App. 24a). Neither case stands for such a proposition. Instead, both of the decisions relied on by the state court conflict with its holding that the NLRA protects any applicant's falsification of qualifications for employment.

In *Winn-Dixie Stores, Inc.*, an employee failed to state on his employment application that he had previously worked for a union. However, the Board found that the true reason for the employee's termination was his affiliation with the union, not his falsification of his employment application. In dicta, the Board observed that it would have been a violation of the Act for the employer to have terminated the employee because of his omission of his union employment. But the Board made clear that the mere omission of "union employment" was distinguishable from the omission or concealment of facts an employer is entitled to consider in its hiring decisions. According to the Board in *Winn-Dixie*, therefore, employee applicants are not entitled to falsify any aspect of their qualifications for employment but are entitled only to withhold information regarding "union employment," i.e., information that the employer is not permitted to ask about in the first place.

The employment application at issue in the present case never requested any information about Mr. Ouelette's union employment, nor was he asked to reveal information about union activity of any kind. Ouelette nevertheless falsified his background so as to mislead Wright Electric regarding work he performed for five employers, both union and non-union, including misconduct directly reflecting on his qualifications for employment. The Board's holding

in *Winn-Dixie* makes clear that such falsifications are not protected by the NLRA, in direct conflict with the state court decision in the present case. *See also Micrometl Corp.*, 333 NLRB 1133 (2001) (upholding discharge of union organizer for falsely identifying past employer on employment application).

In *Hartman Brothers Heating, Inc. v. NLRB*, *supra*, also mistakenly relied on by the state court of appeals, an individual falsely stated on his employment application that he had been laid off by a previous employer, when in fact he had taken a leave of absence in order to organize Hartman. The Court of Appeals for the Seventh Circuit held that the employee was entitled to misrepresent the reason for his separation from his previous employment because an admission that he had taken a leave from a higher paying job would have revealed his organizational objective. But the court observed that an applicant's lie under such circumstances is protected only if "the lie concerns merely his status as a salt, union organizer, or union supporter and not his qualifications for the job." 280 F.3d at 1112-13. Elsewhere, the court limited its holding to protecting only "a lie related *solely* to one's union affiliation or unionizing intentions rather than to one's fitness for the job...."

Again, in the present case, Mr. Ouellette did not "merely" or "solely" lie concerning his status as a salt/union organizer. Rather, he lied in order to cover up misconduct committed by him at previous places of employment. Each of those previous jobs, and his misconduct associated therewith, reflected on Ouellette's qualifications to be hired at Wright Electric. His falsehoods about such previous

employment were in no sense protected by the NLRA.

Neither the Board nor the Seventh Circuit held – or even implied – that any and all concealment of misconduct in previous employment by a union organizer is protected or arguably protected under the Act. Certainly, neither the Board nor the Seventh Circuit held that the concealment of employment history predating the applicant's union organizing activities (as was the case here) was protected or arguably protected under the Act. Finally, neither the Board nor the Seventh Circuit held that an employer subjected to the egregious fraud present in this case should be deprived of a state court remedy for such fraud.

To the extent that *Winn-Dixie* or *Hartman* are read to allow union salts to pick and choose what non-coercive employer questions they will answer truthfully, and to authorize salts to lie with impunity in order to cover up union activity that has not even been asked about, then those decisions would themselves violate this Court's holding in *Town & Country*. This Court did not authorize any special preferences for union organizers as job applicants, nor did the Court in *Town & Country* recognize any right to lie on job applications. The Court merely held that employers were barred from discriminating against salts based upon their union activity.

Thus, the holding of the state court of appeals in this case conflicts directly with the holding of this Court and with the stated limitations of the Seventh Circuit and the NLRB. The state court has created a right to lie on employment applications under the NLRA, where no such right exists. Review by this Court is needed in order to correct the anomaly

identified (and engendered) by the state court's opinion.

B. The State Court's Ruling Has Misapplied The Law of Federal Preemption And Has Thereby Left Employers With No Remedy For Fraudulent Acts.

Having improperly determined that a union salt's falsification of his qualifications for employment was "arguably protected" by the NLRA, the state court of appeals further erred by declaring any effort by the employer to seek redress in the state courts for such a misrepresentation to be preempted by federal labor law. This aspect of the state court's ruling again conflicts with numerous holdings of the federal courts and must be reversed. *See Belknap v. Hale*, 463 U.S. 491 (1983) (no preemption of state fraud claim); *Farmer v. United Broth. Of Carpenters and Joiners of America, Local 25*, 430 U.S. 290, 302 (1977)(no preemption found as to emotional distress suit); *Linn v. Plant Guard Workers*, 383 U.S. 53, 63 (1966)(state defamation claim not preempted); *Bill Johnson's Restaurants v. NLRB*, 461 U.S. 731 (1983)(refusing to enjoin state court litigation that was not "objectively baseless.").

Each of these cases applied principles first set forth by this Court in *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959). *Garmon* preemption was summarized as follows in *Belknap v. Hale, supra*:

> [S]tate regulations and causes of action are presumptively preempted if they concern conduct that is actually or arguably either prohibited or protected

> by the Act. The state regulation or cause of action may, however, be sustained if the behavior to be regulated is behavior that is of only peripheral concern to the federal law or touches interests deeply rooted in local feeling and responsibility.

463 U.S. at 498.

In *Belknap*, this Court held that state law claims of fraud were not preempted by the NLRA. According to the Court, the "critical inquiry" in deciding whether federal labor law preempts such deeply rooted state law claims is "whether the controversy presented to the state court is identical to or different from that which could have been, but was not, presented to the National Labor Relations Board." The *Belknap* Court relied on *Sears, Roebuck & Co. v. San Diego County District Council of Carpenters*, 436 U.S. 180 (1978), where the Court further held: "The primary jurisdiction rationale of *Garmon*, ... does not provide a sufficient justification for preempting state jurisdiction over arguably protected conduct when, as in this case, the party who could have presented the protection issue to the NLRB has not done so and the other party to the dispute has no acceptable means of doing so." *Id.* at 197.

In the present case, the only issue that the NLRB could have addressed (and did address in dismissing the Union's unfair labor practice charge against Wright Electric) was whether Wright unlawfully terminated applicant Ouellette for his support of the Union. But the grounds for Wright's termination of Ouellette were never at issue in the state court lawsuit. The sole issue there was whether

Ouellette (and Local 292) committed acts of fraud and related torts under state laws of general application. The NLRB had no jurisdiction to consider such tort claims and would certainly not have done so if asked.[2]

As this Court further held in *Belknap*:

> [The state] surely has a substantial interest in protecting its citizens from misrepresentations that have caused them grievous harm. It is no less true here than it was in *Linn v. Plant Guard Workers, supra*, at 63, that "the injury" remedied by the state law "has no relevance to the Board's function" and that "the Board can award no damages, impose no penalty, or give any other relief to the plaintiffs in this case. The state interests involved in this case clearly outweigh any possible interference with the Board's function that may result from permitting the action for misrepresentation to proceed.

463 U.S. at 511.

Likewise in the present case, by finding labor law preemption of Wright Electric's claims of misrepresentation, the state court's decision deprives

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[2] Presumably for this reason, both the NLRB and the Eighth Circuit, confronted with a previous interlocutory challenge to Petitioner's state court claims in *Wright Electric, Inc. v. NLRB*, 200 F. 3d 1162 (8th Cir. 1999) implicitly found such claims *not* to be preempted and remanded the case to the state court with the direction that the case be allowed to proceed. The state court of appeals committed further error by failing to adhere to the previous Board and federal court rulings in this regard. (App. 14a-18a).

employers of any remedy for actionable fraud by union salts, because the NLRA provides no rights or remedies to employers for such conduct by unions or their members. By contrast, Minnesota courts have previously upheld a deeply rooted state tradition of protecting persons victimized by fraud. *E.g., N.H. v. Caritas Family Services*, 488 N.W.2d 282, 289 (Minn. 1992); *Florenzano v. Olson*, 387 N.W.2d 168, 174, n.4 (Minn. 1986); *Davis v. Re-Trac Manufacturing Corp.*, 149 N.W.2d 37, 38-39 (Minn. 1967).[3]

This Court's decisions in *Belknap, Sears*, and related cases prohibit such a result, as do other lower federal court decisions that have upheld state law fraud claims against preemption challenges. *See Northwestern Ohio Administrators, Inc. v. Walcher & Fox, Inc.*, 270 F.3d 1018 (6th Cir. 2001); *Operating Engineers Pension Trust v. Wilson*, 915 F.2d 535 (9th Cir. 1990); *Galveston Linehandlers v. ILA*, 140 F. Supp. 2d 741 (S.D. Tex. 2001) (no preemption of employer's claim that union made actionable misrepresentations during "sham" bargaining).

Finally, the state court misapplied this Court's holding in *Int'l Longshoremen's Ass'n v. Davis*, 476 U.S. 380 (1986), a case that found ***no*** labor law preemption of state law claims. That case held that

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[3] In Minnesota, the elements of a claim for fraudulent misrepresentation are well established, and Wright Electric's complaint plainly satisfied those elements. *See N.H. v. Caritas Family Services*, 488 N.W.2d 282, 289 (Minn. 1992); *Florenzano v. Olson*, 387 N.W.2d 168, 174, n.4 (Minn. 1986); *Davis v. Re-Trac Manufacturing Corp.*, 149 N.W.2d 37, 38-39 (Minn. 1967). Similarly, the concealment of a material fact, if the above elements are satisfied, may also constitute fraud. *Lakeland Tool and Engineering, Inc. v. Thermo-Serv, Inc.*, 916 F.2d 476, 479 (8th Cir. 1990); *Spitzmueller v. Burlington Northern Railroad Co.*, 740 F. Supp. 671, 677 (D. Minn. 1990).

"the party claiming preemption is required to demonstrate that his case is one that the [NLRB] could legally decide in his favor." Id. at 395. As explained above, the NLRB has never upheld the interpretation of the Act advanced by the Respondents (and the state court of appeals) in this case. The NLRB has never found employee applicants to have a protected right to lie about their qualifications for employment.

The state court's finding of labor law preemption in the present case directly conflicts with the decisions of this Court and numerous other federal courts and must therefore be reversed.

II. The Issues Presented By This Case Are Of Great Public Importance, In That Employers Will Be Left Defenseless Against Resume Fraud, Absent Review By This Court.

Resume fraud has reached epidemic proportions in the business world and is having a serious adverse impact on the ability of employers to hire qualified workers. Until the state court decision in the present case, federal law had never been held to protect employee applicants' concealment of prior employers or past job transgressions relating to their qualifications, certainly where they had not been asked to reveal their status as union supporters or organizers. Indeed, federal law does not address the issue of resume fraud at all, leaving enforcement of such fraud claims to the states. Absent enforcement of state law protections of the type invoked by Wright Electric in this case, employers will be unable to protect their businesses from serious harm.

In order to protect their ability to hire qualified applicants, employers must be able to investigate and take action against those who commit resume fraud. Indeed, employers are routinely advised by human resource experts that the only way to prevent such fraud is to thoroughly check all employment references on employment applications.[4] In this regard, the right of employers to take appropriate action against applicants who commit resume fraud, once they are discovered, has been repeatedly upheld in state courts across the country. *See, e.g., Sarvis v. Vermont State Colleges*, 772 A. 2d 494 (Vt. 2001); *Crawford Rehabilitation Services, Inc. v. Weissman*, 938 P. 2d 540, 549 (Colo. 1997).

The state court in this case has erroneously held that employee applicants may fabricate their employment histories and conceal affirmative misconduct in previous employment without any risk that they can be held legally accountable for their conduct. Indeed, according to the logic of the state court of appeals, a union adherent may conceal such facts as that he was fired from a prior job for sexual harassment, or previously discharged for theft, or terminated for assaulting a fellow employee, while being immunized by federal labor law from enforcement of state sanction for defrauding prospective employers. This extreme result threatens the rights of all employers to seek redress in the courts for harm to their businesses and goes well beyond the purview of the NLRA.

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[4] *See* Smith and Soutouras, "Check Resume Fraud by Checking References," www.smithjames.com/reference.

CONCLUSION

The decision of the Minnesota Court of Appeals directly conflicts with rulings of this Court and with numerous other federal court decisions on issues of great public importance. For each of the reasons stated above, the Court should grant the writ of certiorari.

Respectfully submitted,

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APPENDIX

Wright Electric, Inc. v. Ouellette, 686 N.W. 2d 313 (Minn. Ct. App. 2004).....1a

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STATE OF MINNESOTA

IN THE COURT OF APPEALS

A03-1683

Wright Electric, Inc., Respondent,

vs.

Thomas A. Ouellette, et al., Appellants.

Filed September 14, 2004

Reversed

Hudson, Judge

Hennepin County District Court

File No. EM 93-016106

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Considered and decided by Hudson,

Presiding Judge; Lansing, Judge; and

Willis, Judge.

SYLLABUS

I. When state law seeks to regulate the exercise of rights protected by the National Labor Relations Act, the National Labor Relations Act preempts the conflicting provisions of state law by operation of the Supremacy Clause. *Brown v. Hotel Rest. Employees & Bartenders, Local* 54, 468 U.S. 491, 503, 104 S. Ct. 3179 (1984).

II. If an activity is arguably subject to the National Labor Relations Act, both state and federal courts must defer to the exclusive

competence of the National Labor Relations Board to avoid the danger of state interference with national policy. *Jara v. Buckbee-hears* Co., 469 N.W.2d 727, 729 (Minn. App. 1991) (citing *San Diego Bldg. Trades Council v. Garmon,* 359 U.S. 236, 245, 79 S. Ct. 773, 780 (1959)).

III. "[A] party asserting pre-emption must advance an interpretation of the Act that is not plainly contrary to its language and that has not been `authoritatively rejected' by the courts or the Board. The party must then put forth enough evidence to enable the court to find that the Board reasonably could uphold a claim based on such an interpretation." *Int'l Longshoremen's Assn v. Davis,* 476 U.S. 380, 395-96, 106 S. Ct. 1904, 1914-15 (1986).

IV. Only if the National Labor Relations Board decides that a party's conduct is not protected or prohibited by the National Labor Relations Act may a state or federal court entertain the litigation. *Int'l Longshoremen's Assn,* 476 U.S. at 397, 106 S. Ct. at 1915-16.

OPINION

HUDSON, Judge

Appellants Thomas Ouellette, Michael J. Priem, and International Brotherhood of Electrical Workers, Local 292 (IBEW), argue that the National Labor Relations Act (NLRA)

preempts respondent Wright Electric, Inc.'s (Wright Electric) claims because Ouellette's conduct of falsifying his employment application to Wright Electric is arguably protected by the NLRA. Wright Electric contends that its claims should proceed in state court because the National Labor Relations Board (NLRB) and the Eighth Circuit Court of Appeals previously rejected IBEW's argument that Wright Electric's claims are preempted, and the NLRB's general counsel refused to file a charge against Wright Electric. Wright Electric also argues that Ouellette's falsifications are not arguably protected because Ouellette's falsifications relate to his qualifications for the position with Wright Electric and not to his union status. Because we find that Wright Electric's claims are preempted by the NLRA, we reverse.

FACTS

Respondent Wright Electric, Inc. (Wright Electric) is a non-union electrical contractor owned by Terry Korthof Wright Electric's headquarters is in Plymouth, Minnesota, and it performs residential, commercial, and industrial electrical work in Minnesota and in other states. Wright Electric has never been a signatory to any collective-bargaining agreement with any labor organization.

Appellant Thomas Ouellette began working in electrical construction in 1985. Ouellette worked for a non-union contractor from

May 1986 until December 1990 and then went to work for a different non-union contractor, BE&K Construction (BE&K). While on a project for BE&K, Ouellette joined appellant International Brotherhood of Electrical Workers, Local 292 ("IBEW")[1] and participated in efforts to organize the other electricians working on the project. The National Labor Relations Board (NLRB) cited BE&K for illegally disciplining Ouellette and a number of other employees for their union-organizing activities. Ouellette left BE&K in 1990.

In the fall of 1992, Wright Electric advertised in the Minneapolis Star Tribune for journeymen electricians. Appellant Michael J. Priem, an agent of IBEW, suggested to Ouellette that he apply and, if hired, attempt to organize the electricians working for Wright Electric. Priem advised Ouellette that if he put union shops on his application, he probably would not get hired. Ouellette applied to work at Wright Electric, and, when asked to list prior employers on the application, Ouellette omitted BE&K and the union contractors for whom he had worked. Rather than listing the union employers and BE&K, Ouellette extended his dates of employment at his previous job into 1992. Ouellette signed the application directly below the statement, "I certify that answers given herein are true and complete to the best of my knowledge.... In the event of employment, I understand that false or misleading information given in my application or interview(s) may result

in discharge." Wright Electric's field supervisor, Kenneth Stavrum, interviewed Ouellette, and Ouellette indicated that he wanted to leave his current job because the status of the company was uncertain. Stavrum hired Ouellette, and Ouellette was not disciplined until he was fired on February 5, 1993.

In late January 1993, Ouellette was assigned to work on the Prairie View School construction project in Eden Prairie. The general contractor on that project was Penn-Co Construction, Inc. (Penn-Co). Penn-Co was the general contractor on a different school project where Ouellette had worked for a union contractor. On that project, union carpenters had labor disputes with Penn-Co. The union electricians, including Ouellette, supported the carpenters by wearing stickers on their hard hats with Penn-Co's name in a circle with a slash through it. While Ouellette was working on the school project for Wright Electric, Penn-Co supervisors recognized Ouellette. Wright Electric claims that the supervisors recognized Ouellette because the Penn-Co supervisors had experienced problems with Ouellette on a past job when he was working for Gephart Electric. According to Wright Electric, the Penn-Co supervisors gave this information to Wright Electric's foreman. Appellants claim that the supervisors recognized Ouellette and notified Wright Electric's foreman that Ouellette was a union electrician. Ouellette's employment application was reviewed; there was

no mention of Gephart Electric, and Korthof was informed of the discrepancy.

Korthof conducted an investigation and learned that Gephart Electric had employed Ouellette, and Ouellette did not include that job on his employment application. Korthof also learned that Penn-Co supervisors had experienced problems with Ouellette in the past when Ouellette was employed with Gephart Electric. Wright Electric claims that based on this information, Korthof terminated Ouellette from his employment.

Appellants claim that when Ouellette realized he had been identified as a union member, he called Priem. The next day Priem faxed a letter to Wright Electric and hand-delivered a copy to Stavrum informing him that Ouellette was a union member engaged in protected unionorganizing activity during his non-working time. IBEW also claims that shortly after receiving Priem's letter, Stavrum paged Ouellette and told him to go home because there was a lack of work. Ouellette called a few days later to inquire about work, and Korthof told him there was no work available and that two other electricians were sent home due to a lack of work. Two days later, Ouellette was called in to work and was assigned to spend the day working with a supervisor on a residential project. When Ouellette arrived to work the next day, on February 5, 1993, Korthof told him he was fired

and handed him a termination letter stating that the reason for his firing was "falsifying information on employment application." After Ouellette's termination, Wright Electric learned that Ouellette had omitted four other employers from his employment application, including BE&K.

Following his termination, Ouellette, with the support of IBEW and Priem, filed a claim for unemployment-insurance benefits with the Minnesota Department of Jobs and Training. IBEW and Priem filed unfair-labor-practice charges with Region 18 of the NLRB, alleging that Wright Electric had suspended and fired Ouellette because of his union status in violation of the National Labor Relations Act (NLRA). Wright Electric's responsive position statement to the regional director of Region 18 (regional director) states that Ouellette was fired pursuant to strict, nondiscriminatory policies for "[f]alsifying information on [his] employment application." The regional director agreed and determined that there was insufficient evidence to conclude that Wright Electric terminated Ouellette because of his union activities in violation of the NLRA and dismissed the charges without issuing a complaint to the NLRB. IBEW appealed to the NLRB general counsel in Washington, D.C., who refused to overrule the regional director.

In August 1993, Wright Electric brought this action in Hennepin County District Court against IBEW, Ouellette, and Priem. Against Ouellette, Wright Electric asserted breach of at-will employment contract, breach of fiduciary duty and duty of loyalty, recovery of salary and benefits, and unjust enrichment. Against IBEW, Ouellette and Priem, Wright Electric asserted claims of fraudulent misrepresentation, fraudulent concealment, wrongful use of property, malicious prosecution of an unfair-labor practice charge, and malicious prosecution of the unemployment-insurance claim. Specifically, Wright Electric alleged that Ouellette, acting at the direction of IBEW and Priem, submitted a falsified employment application to the company and thereby obtained employment. Wright Electric also alleged that Ouellette's actions were part of a pattern and practice of fraud perpetrated by IBEW to accomplish their own unlawful objectives. Wright Electric sought compensatory damages, a declaration that IBEW's conduct was unlawful, and an injunction prohibiting such conduct in the future.

IBEW, Priem, and Ouellette brought a motion to dismiss. On January 14, 1994, the district court dismissed the malicious-prosecution claims but ruled that Wright Electric's other claims were maintainable as a matter of law. Wright Electric moved to amend the complaint to state a claim for punitive damages, and the

district court allowed Wright Electric to amend its complaint.

After Wright Electric filed the action in Hennepin County District Court, IBEW filed another charge with Region 18 of the NLRB in Minneapolis, alleging that Wright Electric's filing of the Hennepin County lawsuit was itself an independent unfair-labor practice. IBEW also argued, in its charges with the NLRB, that some of Wright Electric's discovery requests in the Hennepin County litigation violated the NLRA, specifically, Wright Electric's attempt to discover the identity of employees who signed union-authorization cards. The NLRB's general counsel issued complaints based on IBEW's charges. The parties stipulated, and the district court ordered, that the Hennepin County action be stayed pending the NLRB resolution of the discovery issues.

The NLRB consolidated IBEW's charges with several charges that do not relate to the Hennepin County litigation, and the NLRB considered all of the charges together. The NLRB held that the discovery sought by Wright Electric regarding the union-authorization cards violated the NLRA. *Wright Electric, Inc., 327* N.L.R.B. 1194, 1195 (1999). The NLRB stayed the question of whether Wright Electric committed an independent unfair labor practice in bringing the Hennepin County lawsuit until the conclusion of the state court litigation. Id. at 1194-95. Wright

Electric sought review of the decision by the Eighth Circuit Court of Appeals, which affirmed the NLRB's decision in all respects. *Wright Elec., Inc. v. NLRB,* 200 F.3d 1162 (8th Cir. 1999).

Appellants then moved the Minnesota state district court for summary judgment, asserting that Wright Electric's claims are preempted by the NLRA. The district court denied the motion on the grounds that "the issues in this case do not give the NLRB jurisdiction," citing the NLRB's 1999 decision as authority. Appellants subsequently filed a notice of appeal with this court.

ISSUE

Does the NLRA preempt Wright Electric's claims?

ANALYSIS

On appeal from summary judgment, this court examines whether there are any genuine issues of material fact and whether the lower court erred in its application of the law. *Cummings v. Koehnen,* 568 N.W.2d 418, 420 (Minn. 1997). On appeal from a denial of summary judgment, we view the record in the light most favorable to the nonmoving party.

Fabio v. Bellomo, 504 N.W.2d 758, 761 (Minn. 1993).

The NLRA protects the right of unions and union members to "salt" unorganized workplaces by seeking employment with non-union employers in order to engage in union organizing. *NLRB v. Town & Country Elec., Inc.,* 516 U.S. 85, 96-98, 116 S. Ct. 450, 456-57 (1995). "Salting" is the practice by which a union inserts its organizers into an employer's workforce in the hope that they will be able to organize it. *Hartman Bros. Heating & Air Conditioning, Inc. v. NLRB,* 280 F.3d 1110, 1111 (7th Cir. 2002). "Salt" is the term used to describe the union organizer who is inserted into the workforce. *See id.* With some key exceptions, the NLRA also protects a union member's right to misrepresent his or her employment history in order to conceal union status when seeking employment in a non-union workplace. Id. at 1112; *Winn-Dixie Stores,* Inc., 236 N.L.R.B. 1547, 1547 (1978). Appellants argue that because the NLRA protects a union member's right to misrepresent his employment history in order to conceal his union status when seeking employment in a nonunion workplace, Wright Electric's claims are preempted by the NLRA. Appellants contend that if the conduct, which a party is seeking to subject to state law, is even "arguably protected" by the NLRA, the primary and exclusive jurisdiction of the NLRB requires that both state and federal courts cede jurisdiction

over the matter. Thus, appellants contend that the NLRA preempts Wright Electric's claims because Ouellette's conduct of falsifying his employment application to Wright Electric was arguably protected by the NLRA. Appellants also argue that the general counsel's decisions not to file a charge against Wright Electric or assert that federal law preempts Wright Electric's claims, are not-for collateral-estoppel purposes determinations that Wright Electric's claims are not preempted.

Wright Electric counters that the NLRB has repeatedly refused to assert its exclusive jurisdiction and that, therefore, the NLRB and the Eighth Circuit Court of Appeals have effectively rejected IBEW's preemption claim. Specifically, Wright Electric contends that Ouellette's falsifications are not preempted by the NLRA as evidenced by the fact that the regional director and the NLRB's general counsel refused to file charges against Wright Electric, thereby determining that Ouellette's falsifications are not arguably protected. Wright Electric argues that an employer is at liberty to deny a union adherent employment for a host of non-discriminatory reasons and argues that Ouellette's falsifications do not relate to his union status, but rather, relate to his qualifications for the position with Wright Electric.

In denying appellants' motion for summary judgment, the district court found that

the issues in this case do not give the NLRB jurisdiction, and noted that the NLRB determined that the remaining causes of action (Wright Electric's state-law claims) required "final adjudication" of the state court proceedings. The district court concluded that there are genuine issues of material facts as to the fraud, breach-of-contract, unauthorized-use-of-property, and unjust enrichment claims.

Preemption

A. The NLRB and Eighth Circuit Decisions

When state law seeks to regulate the exercise of rights protected by the NLRA, the NLRA preempts the conflicting provisions of state law by operation of the Supremacy Clause. *Brown v. Hotel Rest. Employees & Bartenders, Local 54,* 468 U.S. 491, 503, 104 S. Ct. 3179, 3186 (1984).

But Wright Electric argues that the NLRB and Eighth Circuit Court of Appeals effectively rejected IBEW's preemption claim. IBEW contends that the preemption issue was never before the NLRB or the Eighth Circuit Court of Appeals and thus was never directly decided. Our review of the record convinces us that appellants are correct the administrativelaw

judge, the NLRB, and the Eighth Circuit did not *directly* address whether Wright Electric's claims are preempted by the NLRA. Our holding is supported by a brief overview of these three decisions.

The issues presented to the administrative-law judge (that are pertinent to this case) were whether Wright Electric violated the NLRA by (1) bringing two malicious prosecution claims against IBEW, Ouellette, and Priem, and (2) requesting discovery of employee union-authorization cards. *Wright Elec., Inc., 327* N.L.R.B. at *1194*. The administrative-law judge determined that the state court had dismissed the malicious-prosecution claims, but there was not a final disposition of those claims because Wright Electric preserved the record of those claims for appeal. Id. at *1204-05*. Accordingly, the administrative-law judge dismissed the allegation that Wright Electric violated the NLRA by bringing the underlying lawsuit. The administrative-law judge also determined that the discovery sought by Wright Electric was valid because many other claims in Wright Electric's complaint remain viable and noted that "[t]here is neither allegation nor argument that any one of those claims `lack a reasonable basis in fact or law.'" Id. at 1205 (citing *Bill Johnson's Rests. v. N.L.R.B., 461 U.S.* 731, 748, 103 S. Ct. 2161, 2173 (1983)). The administrative-law judge dismissed the allegations that Wright Electric violated the NLRA due to its discovery requests.

Preemption was not raised by the parties, nor did the judge discuss preemption in its order.

The NLRB reviewed and affirmed the administrative-law judge's determination on the malicious-prosecution portion of the decision, with the modification that the allegation be held in "abeyance until [the administrative-law judge] receives notification that the state court has resolved the matter pending before it [and] [a]t that point, the judge can determine ... whether the state court suit lacked merit and, if so, whether it was filed for a retaliatory motive." Id. at 1195. But the NLRB reversed the administrative-law judge's determination on the discovery requests. The NLRB found that Wright Electric violated the NLRA because it "failed to state an interest in examining employee authorization cards that outweighs the considerable confidentiality interests of employees who sign cards." Id. Preemption was not addressed by the parties or the board.

The Eighth Circuit Court of Appeals affirmed the NLRB's order, noting, "we agree with the [NLRB] that the information Wright Electric seeks is not relevant to its state law claims." *Wright Elec., Inc. v. N.L.R.B.*, 200 F.3d 1162, 1167 (8th Cir. 2000). The Eighth Circuit concluded that the NLRB did not err in enjoining Wright Electric's discovery request because "the discovery request has an illegal objective and has no overriding business justification." Id.

Preemption was not addressed by the parties or the court.

Thus, there was no direct decision by the administrative-law judge, the NLRB, or the Eighth Circuit Court of Appeals that directly decided whether Wright Electric's claims are preempted by the NLRA. Although all three decision-makers had the *opportunity* to decide whether Wright Electric's claims are preempted by the NLRA; all three decision-makers chose to resolve only those specific issues presented to them. As a result, Wright Electric's argument that the Eighth Circuit and the NLRB effectively rejected the IBEW's preemption claim fails under a collateral-estoppel analysis.

The Minnesota Supreme Court has stated that collateral estoppel may apply, in appropriate instances, to an administrative decision when an agency acts in a judicial or quasi judicial capacity. *Graham v. Special Sch. Dist. No. 1*, 472 N.W.2d 114, 116 (Minn. 1991). The court noted that for collateral estoppel to apply:

1) the issue to be precluded must be identical to the issue raised in the prior agency adjudication;

2) the issue must have been necessary to the agency adjudication and properly before the agency;

3) the agency determination must be a final adjudication subject to judicial review;

4) the estopped party was a party or in privity with a party to the prior agency determination; and

5) the estopped party was given a full and fair opportunity to be heard on the adjudicated issue.

Id. (citations omitted). Several of the collateral-estoppel factors are met because the NLRB's determination is a final adjudication, which was subjected to judicial review; the estopped parties (IBEW, Ouellette, and Priem) were parties to the prior agency determination; and the estopped parties were given a full and fair opportunity to be heard. Id. But, significantly, Wright Electric failed to satisfy the first collateral-estoppel factor because the preemption issue was not raised in any of the prior agency or court adjudications. Therefore, we conclude that appellants' preemption claim was not effectively rejected by the administrative-law judge, the NLRB, or the Eighth Circuit Court of Appeals.

B. General Counsel's Refusal to File a Charge

Wright Electric also contends that Ouellette's falsifications are not protected under the NLRA because the regional director and the NLRB's general counsel refused to file a charge against Wright Electric even though Wright Electric admitted that it fired Ouellette because he falsified his application. Appellants assert that the general counsel's decision not to file a charge against Wright Electric cannot be construed as a de facto determination that Wright Electric's claims are not preempted. We agree.

The United States Supreme Court has already decided that the general counsel's refusal to file a charge is not the same as a decision finding a party's claims are not preempted by the NLRA. *See San Diego Bldg. Trades Council, 359* U.S. at *245-46, 79* S. Ct. at *780.* The Supreme Court stated that the NLRB's failure to determine the status of the disputed conduct by declining to assert jurisdiction or the "refusal of the General Counsel to file a charge" does not "leave the States free to regulate activities they would otherwise be precluded from regulating." Id. The Supreme Court concluded that

[i]n the absence of the [NLRB's] clear determination that an activity is neither protected nor prohibited or of compelling precedent applied

to essentially undisputed facts, it is not for this Court to decide whether such activities are subject to state jurisdiction.... The governing consideration is that to allow the States to control activities that are potentially subject to federal regulation involves too great a danger of conflict with national labor policy.

Id. at 246, 79 S. Ct. at 780. Having found no merit to Wright Electric's procedural challenges to appellants' preemption claim, we now address the merits; specifically whether Ouellette's conduct of falsifying his employment application to Wright Electric was an "arguably protected" activity under the NLRA.

C. "Salting" as an "Arguably Protected Activity"

Appellants argue that, because the NLRA protects a union member's right to misrepresent his employment history in order to conceal his union status when seeking employment in a non-union workplace, Wright Electric's claims are preempted by the NLRA. Wright Electric contends that Ouellette's falsifications are not arguably protected because Ouellette's falsifications do not relate to his union status, but rather, relate to his qualifications for the position with Wright Electric.

As previously stated, when state law seeks to regulate the exercise of rights protected by the NLRA, the NLRA preempts the conflicting provisions of state law by direct operation of the Supremacy Clause. *Brown v. Hotel Rest. Employees & Bartenders, Local 54,* 468 U.S. 491, 503, 104 S. Ct. 3179 (1984). Even if an activity is arguably subject to section 7 or section 8 of the NLRA, both state and federal courts must defer to the exclusive competence of the NLRB to avoid the danger of state interference with national policy. *Jara v. Buckbee-Mears* Co., 469 N.W.2d 727, 729 (Minn. App. 1991) (citing *San Diego Bldg. Trades Council v.Garmon,* 359 U.S. 236, 245, 79 S. Ct. 773, 780 (1959)). "The party asserting preemption must show that the alleged activity is arguably protected or prohibited by the NLRA and that the NLRB reasonably could uphold the party's claim." Id. (citing *Int'l Longshoremen's Ass'n v. Davis,* 476 U.S. 380, 395, 106 S. Ct. 1904, 1914 (1986)). The United States Supreme Court has addressed and defined "arguably" in deciding when an activity is "arguably protected or prohibited" stating:

If the word "arguably" is to mean anything, it must mean that the party claiming preemption is required to demonstrate that his case is one that the [NLRB] could legally decide in his favor. That is, a party asserting preemption must advance an interpretation of the Act that is not plainly contrary to its language and that has

not been "authoritatively rejected" by the courts or the [NLRB]. The party must then put forth enough evidence to enable the court to find that the [NLRB] reasonably could uphold a claim based on such an interpretation.

The lack of a[n] [NLRB] decision in no way suggests how it would or could decide the case if it had the opportunity to do so. To accept the Union's submission would be essentially equivalent to allowing a conclusory claim of preemption and would effectively eliminate the necessity to make out an arguable case. The better view is that those claiming preemption must carry the burden of showing at least an arguable case before the jurisdiction of a state court will be ousted.*Int'l Longshoremen's Assn,* 476 U.S. at 395-96, 106 S. Ct. at 1914-15. The Supreme Court also noted that "a court first must decide whether there is an arguable case for preemption; if there is, it must defer to the [NLRB], and only if the [NLRB] decides that the conduct is not protected or prohibited may the court entertain the litigation." Id. at 397, 106 S. Ct. at 1915-16.

Appellants rely on two decisions in support of its position that the NLRA protects "salts" who conceal their union affiliation when applying for jobs with non-union employers. In *Winn-Dixie Stores, Inc.,* the NLRB found that an employee who admitted to intentionally falsifying his employment application was discharged because of his prior affiliation with a union. 236

N.L.R.B. 1547, 1547 (1978). The NLRB noted that "[e]ducational background, criminal record, and history of compensation claims are all factors which a potential employer may lawfully take into account in deciding whether to hire an applicant, and hence a discharge for falsification of information on such matters does not itself violate" the NLRA. Id. But the NLRB found that the employer's reasons for discharging the employee were pretextual and that the employee was actually discharged due to his prior affiliation with a union. Id. In making this finding, the NLRB relied on anti-union comments the employer had made, such as the employee's supervisor stating that the employee is probably correct in thinking that if he had put his union job on his application the employee "probably wouldn't be here," and the supervisor stating that the employer would rather close than "have anything to do with unions." Id. at 1547, 1549.

In *Hartman Bros. Heating & Air Conditioning, Inc.*, the Seventh Circuit Court of Appeals found that a "salt" may lie to get a job "if the lie concerns merely his status as a salt, union organizer, or union supporter and not his qualifications for the job." 280 F.3d at 1112. The Seventh Circuit noted that a state statute that makes it a crime for a person to "knowingly or intentionally" make a false or misleading written statement with the intent to obtain employment would be preempted by the NLRA because the state statute would interfere with unionorganizing

activity without any justification consistent with the NLRA. Id. at 1113. The Seventh Circuit reasoned that "a lie related solely to one's union affiliation or unionizing intentions rather than to one's fitness for the job cannot, consistent with the [NLRA] as it [has been] interpreted, be material to the hiring decision." Id.

Based on the NLRB and Seventh Circuit decisions, if Ouellette lied on his application to hide his union affiliation and status as a "salt," then Wright Electric's claims are preempted by the NLRA. Therefore, we conclude that the IBEW has advanced an interpretation of the NLRA "that is not plainly contrary to its language and that has not been `authoritatively rejected' by the courts or the [NLRB]." *Int'l Longshoremen's Assn,* 476 U.S. at 395-96, 106 S. Ct. at 1914-15. The remaining issue, then, is whether the IBEW has "put forth enough evidence to enable [this] court to find that the [NLRB] reasonably could uphold a claim based on such an interpretation." Id.

We first note that the parties dispute the reason that Ouellette falsified his employment application and the basis for Wright Electric's termination of Ouellette. Appellants contend that Ouellette falsified his application to hide his union affiliation and status as a "salt." According to appellants, had Ouellette disclosed, for example, his employment with the non-union contractor BE&K, Wright Electric would have

discovered that he was involved in protected efforts to unionize BE&K. Wright Electric contends that Ouellette's falsification does not relate to his union status, but rather to his qualifications for the position at Wright Electric.

But this court cannot serve as the fact-finder. *Kucera v. Kucera,* 275 Minn. 252, 254, 146 N.W.2d 181, 183 (1966). Thus, it would be inappropriate for this court to review the record in an effort to determine whether Ouellette lied on his application to hide his union affiliation or to hide aspects of his job history that would relate to his qualifications for the job with Wright Electric. Our sole task is to determine whether IBEW has "put forth enough evidence to enable [this] court to find that the [NLRB] reasonably could uphold a claim based on such an interpretation." *Int'l Longshoremen's Ass'n,* 476 U.S. at 395-96, 106 S. Ct. at 1914-15. We believe that appellants have met their burden. Appellants have shown, and Wright Electric admits, that Wright Electric has never been a signatory to any collective-bargaining agreement with any labor organization. The record also shows that Ouellette was fired a few days after supervisors discovered that he had worked for union contractors in the past. Moreover, Ouellette's firing occurred a few days after Priem faxed a letter to Wright Electric and handdelivered a copy of the letter to Stavrum, informing him that Ouellette was a union member engaged in protected union-organizing activity during his

non-working time. In addition, the record indicates that Ouellette's work was satisfactory and that he had not been disciplined until he was fired. From this evidence, appellants have carried their "burden of showing at least an arguable case" that Wright Electric's claims are preempted by the NLRA because Ouellette was arguably fired due to his union status.

We note, however, that-contrary to appellants' contention-an employee's "qualifications" consist of more than the ability to meet the technical qualifications for the job; in this instance, an electrician's license, some comparable experience, and an insurable driving record. Thus, we find some merit in Wright Electric's counsel's statement at oral argument that IBEW's narrow definition of "qualifications" incorrectly suggests that any warm body with the most basic of skills is "qualified" for a particular job. Moreover, the NLRB has held that "[e]ducational background, criminal record, and history of compensation claims are all factors which a potential employer may lawfully take into account in deciding whether to hire an applicant, and hence a discharge for falsification of information on such matters does not itself violate" the NLRA. *Winn-Dixie Stores, Inc., 236* N.L.R.B. at 1547. Similarly, common sense suggests that an employer should also be able to take into account problems or disciplinary measures that a past employer has had with the applicant, if such problems or disciplinary

measures do not relate to the applicant's union affiliation. And that is Wright Electric's basic argument. Wright Electric thus contends that Ouellette's falsifications went far beyond the lies told by the salts in *Hartman Bros v. Winn-Dixie Stores.*

But therein lies the rub. As the law now stands, an applicant/salt may permissibly falsify his application and thereby hide negative, relevant aspects of his qualifications (even past misconduct), if the past misconduct with non-union employers happened to occur during the same time that the applicant/salt was also engaged in protected union activities. In such cases, we believe a salt has met the minimal burden of demonstrating that falsifying an application by omitting any reference to the employer in question is "arguably protected" under the NLRA. Until the NLRB or the United States Supreme Court addresses this anomaly, the law compels the result that we reach here today.

Because the malicious-prosecution claim is currently being held in abeyance until the administrative-law judge receives notification that this state court matter has been resolved, the NLRB may find, while resolving the malicious-prosecution claim, that Ouellette lied on his application to conceal past job misconduct and that such misconduct reflects on his qualifications for the job with Wright Electric. If the NLRB so finds, Minnesota courts may then entertain this

litigation and Wright Electric's claims. *See Int'l Longshoremen's Ass'n, 476* U.S. at *397, 106 S. Ct. at 1916* (stating if the NLRB decides that the conduct is not protected or prohibited the court may entertain the litigation). Until the NLRB makes such a finding, the district court must defer to the exclusive competence of the NLRB to avoid the danger of state interference with national policy. Thus, the district court erred in finding that it had jurisdiction over Wright Electric's claims.

DECISION

There was no determination by the administrative-law judge, the NLRB, or the Eighth Circuit Court of Appeals that Wright Electric's claims are preempted by the NLRA because preemption was never raised by the parties or decided by any of the tribunals. In addition, IBEW's preemption claim is not collaterally estopped by the general counsel's decision not to assert that federal law preempts Wright Electric's claims. Finally, IBEW has met its burden of showing that there is an arguable case for preemption under the NLRA, and therefore the district court must defer to the exclusive competence of the NLRB to avoid the danger of state interference with national policy.

Reversed.

[1] "IBEW" will refer only to Local *292* International Brotherhood of Electrical Workers.

[2] The unemployment-insurance-benefit claim was ultimately resolved in favor of Wright Electric.

[3] Section 7 of the NLRA provides, in part, "[e]mployees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." *29 U.S.C. § 157 (2002).*

[4] Section 8 of the NLRA provides, in part,
It shall be an unfair labor practice for an employer- -
1. to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;
3. by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization.
29 U.S.C. § 158(a)(1), (3) (2002).
[5]- Wright Electric contends that Ouellette concealed a number of facts that go directly to his qualifications for the position at Wright Electric. Wright Electric contends Ouellette concealed that: (1) he used a former employer's truck to perform a "side job" without a permit, in violation of state law and the employer's policies; (2) he resigned from this same job without notice before

the former employer could address the misconduct; (3) he was ineligible for rehire with this former employer; (4) he had been reprimanded and terminated from his employment with a second former employer; and (5) he allegedly intentionally broke light bulbs on a job while working for a third former employer.

STATE OF MINNESOTA

IN SUPREME COURT

A03-1683

Wright Electric, Inc.,
Petitioner,

vs.

Thomas A. Ouellette, et al.,
Respondents.

OFFICE OF
APPELLATE COURTS
DEC 1 4 2004

FILED

ORDER

Based upon all the files, records and proceedings herein,

IT IS HEREBY ORDERED that the petition of Wright Electric, Inc., for further review be, and the same is, denied.

Dated: December 14, 2004

BY THE COURT:

Kathleen A. Blatz Chief Justice

RELEVANT CONSTITUTIONAL PROVISIONS AND STATUTES

United States Constitution, Article VI, Clause 2 (Supremacy Clause)

This Constitution, and the laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the authority of the United States, shall be Supreme Law of the land; and the Judges in every state shall be bound thereby, any thing in the Constitution or Laws of any state to the contrary notwithstanding.

United States Constitution, First Amendment

Congress shall make no law … abridging the … right of the people … to petition the Government for a redress of grievances.

29 U.S.C. § 157. Right of Employees as to Organization, Collective Bargaining, etc.

Employees shall have the right to self-organization, to form, join, or assist labororganizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor

organization as a condition of employment as authorized in section 158(a)(3) of this title.

29 U.S.C. § 158. Unfair Labor Practices

(a) Unfair Labor Practices by Employer

It shall be an unfair labor practice for an employer –

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;.... ***

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discrouage membership in any labor organization....

(2)

No. 04-1230

Supreme Court, U.S.
FILED
MAY 16 2005
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

WRIGHT ELECTRIC, INC.,
Petitioner,

v.

THOMAS A. OUELLETTE, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 292, AFL-CIO, and MICHAEL J. PRIEM,
Respondents.

On Petition for a Writ of Certiorari to the Minnesota Court of Appeals

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RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Minnesota Court of Appeals correctly held that a non-union employer's state court common law misrepresentation action arising from its hiring and firing of a union member who concealed his prior union-related employment on his job application is preempted by the exclusive jurisdiction of the National Labor Relations Board, under the principles established in ***San Diego Building Trades Council v. Garmon***, 359 U.S. 236 (1959), and its progeny, on the ground that the specific facts alleged in this case were sufficient to show an arguable violation of §8(a)(3) of the National Labor Relations Act because that the union member "was arguably fired [by the employer] due to his union status." Pet. App. 26a.

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IN THE

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No. 04-1230

WRIGHT ELECTRIC, INC.,

Petitioner,

v.

THOMAS A. OUELLETTE, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 292, AFL-CIO, and MICHAEL J. PRIEM,

Respondents.

On Petition for a Writ of Certiorari to the Minnesota Court of Appeals

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

This litigation grows out of a union organizing effort during which the employer hired and fired a union member engaged in organizing activity.

Petitioner Wright Electric, Inc. is a non-union electrical contractor with a record of discriminating against job applicants who reveal union membership when seeking employment. ***Wright Electric, Inc.***, 327 NLRB 1194, 1195-96 (1999), enf'd 200 F.3d 1162 (8th Cir. 2000).

Respondent Thomas A. Ouellette is a journeyman electrician and member of Respondent International Brotherhood of Electrical Workers Local 292. Ouellette applied for work

at Wright Electric at the suggestion of Respondent Michael J. Priem, a Local 292 business agent, in order to earn a living at his trade and to seek support among his fellow electricians for Local 292. Priem advised Ouellette that, if Ouellette disclosed his union membership by identifying the contractors that he had worked for since becoming a union member two and a half years previously, Wright Electric would not hire him. Ouellette filled out a written employment history when applying at Wright Electric, which accurately reported the amount and nature of his electrician's experience, but "stretched" his initial, three and a half year employment with a non-union contractor to cover the entire six-year period preceding his application to Wright, omitting non-union contractor BE&K Construction Co., which had discriminated against Ouellette for union activity immediately after he joined Local 292[1] and the union contractors for whom he had worked during the prior two years.

Ouellette was hired by Wright Electric and performed admittedly satisfactory work for four months. Wright Electric then assigned Ouellette to a project at which managers of another non-union contractor recognized Ouellette as a union electrician and reported his union membership to Wright Electric managers. Wright Electric immediately sent Ouellette home. Ouellette then advised Priem that he had been identified to Wright Electric as a union member, and Priem sent Wright Electric's manager a letter confirming Ouellette's union membership and his organizing activity among Wright's employees. Wright fired Ouellette very shortly thereafter.

---

[1] The NLRB issued a complaint against BE&K to that effect, which BE&K settled through an agreement which promised to expunge all reference to the discriminatory discipline from Ouellette's file. Yet, Petitioner obtained these "expunged" disciplinary records from BE&K after initiating this action and now claims that Ouellette unlawfully concealed this "expunged" disciplinary record by omitting BE&K from his employment history. See Pet. 2 and Pet. App. 26a-27a.

Local 292 filed a charge with the National Labor Relations Board alleging that Wright Electric had discriminated against Ouellette on account of his union status in a manner prohibited by §8(a)(3) of the National Labor Relations Act. Wright Electric responded with a position statement claiming that Ouellette had been laid off for lack of work, only coincidentally on the same day Wright learned of his union membership, and fired several days later for violating strict and uniformly enforced company rules requiring an accurate employment history for all job applicants and prohibiting work-related dishonesty of any kind. The NLRB Regional Office, on the strength of that position statement and without any further investigation, dismissed the charge without issuing a complaint.

Wright Electric then brought this action, alleging no fewer than eleven state common law tort claims against each of the Respondents, all sounding in misrepresentation and all based on Ouellette's having given an inaccurate employment history on his job application.[2] In defending this action, Respondents discovered that Wright Electric provided patently false information in its position statement to the NLRB. Specifically, Respondents learned that:

(1) when Wright Electric sent Ouellette home on account of a claimed "lack of work," Wright assigned an

---

[2] After Wright Electric brought this action, Local 292 filed an additional charge with the NLRB asserting that Wright's prosecution of this suit violated §§8(a)(1) and (3) of the NLRA. The NLRB's General Counsel issued a complaint alleging that, under the rule in ***Bill Johnson's Restaurants v. NLRB***, 461 U.S. 731 (1983), Wright's prosecution of this action was legally malicious because it was brought in retaliation for the Respondent's conduct protected by §7 of the NLRA and lacked a reasonable basis in state law. The NLRB ruled that it could not proceed on that complaint unless and until Wright Electric's action was dismissed by final judgment of the state courts. ***Wright Electric, Inc.***, *supra*. This Court subsequently overruled ***Bill Johnson's Restaurants*** in ***BE&K Construction Co. v. NLRB***, 536 U.S. 516 (2002).

unlicensed apprentice to complete the project on which Ouellette had been working, without the journeyman supervision required by state law;

(2) Wright Electric in fact obtained pre-hire employment histories from only about half of its electricians and only sporadically checked those obtained;

(3) when Wright Electric's managers serendipitously discovered that a newly-hired non-union employee who claimed twenty months of prior electrical experience on his application in fact had only two weeks of prior experience, Wright took no disciplinary action other than to delay his first, experience-based wage increase;

(4) when Wright Electric discovered that two of its non-union electricians had defrauded customers by padding their time and expense records, it took no recorded disciplinary action at all; and

(5) Wright Electric, in fact, had never significantly disciplined any other employee for any dishonesty of any kind.

On the basis of this discovered information, Respondents moved for summary judgment on the ground that, under the principles of ***San Diego Building Trades Council v. Garmon***, 359 U.S. 236 (1959), the NLRB's exclusive jurisdiction preempts Wright Electric's state court action, because the facts alleged were sufficient to show that the NLRA arguably prohibited Wright Electric's conduct in this matter and arguably protected Ouellette's conduct. The trial court denied Respondents' motion. The Minnesota Court of Appeals reversed, holding that, on the record in this case:

> Appellants have carried their 'burden of showing at least an arguable case' that Wright Electric's claims are preempted by the NLRA because Ouellette was arguably fired due to his union status."

Pet. App. 26a, quoting ***International Longshoremen's Ass'n v. Davis***, 476 U.S. 380, 395-96 (1986).

Wright Electric petitioned the Minnesota Supreme Court for discretionary review of the Minnesota Court of Appeals' decision. By order dated December 14, 2004, the Minnesota Supreme Court denied review. Pet. App. 31a.

ARGUMENT

THIS CASE DOES NOT PRESENT ANY QUESTION WARRANTING THIS COURT'S REVIEW.

The Minnesota Court of Appeals' narrowly tailored, fact specific ruling that the primary jurisdiction of the NLRB preempts Petitioner's state court action is firmly rooted in the principles developed in ***San Diego Building Trades Council v. Garmon***, 359 U.S. 236 (1959), and its progeny, and the sound application of those principles to the facts alleged by the parties concerning the NLRA-regulated employer and employee conduct giving rise to this litigation. The lower court's holding does not conflict, or even cause the slightest tension, with any other NLRA preemption ruling of any other court. Because the Minnesota court's ruling is entirely consistent with this Court's well-settled ***Garmon*** preemption jurisprudence, it raises no question warranting review.

The Petitioner essentially concedes as much by ignoring the holding below in stating its first "Question Presented for Review" and "Reasons for Allowing the Writ." (Pet. pp. i and 7-13.) Instead, in framing that first "Question," Petitioner proceeds as if the Minnesota court had generated a question of federal law by issuing a substantive ruling construing §7 of the NLRA delineating the extent of §7's protection of job applicants who misrepresent their qualifications. But the Minnesota court issued no such ruling. Recognizing the limits of its jurisdiction under ***Garmon***, the lower court confined its holding to ruling on whether the conduct giving rise to this action is *arguably* protected *or* prohibited by the NLRA, and, therefore, within the exclusive primary jurisdiction of the NLRB. Simply stated, the

decision below does not raise the substantive question of federal labor law tendered by the Petitioner in its first "Question Presented for Review." The lower court's review of those cases raises no issue warranting this Court's review.

To the extent that the Petitioner acknowledges that this is a preemption case at all, in its second "Question Presented for Review" and secondary "Reasons for Allowing the Writ" (Pet. pp. i and 13-14), it mischaracterizes the decision below as a ruling based on substantive principles that stands for the proposition that "the NLRA preempts all state tort law claims by employers against employee applicants who lie on their employment applications with regard to their qualifications." (Pet. p. i. See also, Pet. pp. 13-18.) But the Minnesota court made no substantive NLRA ruling, much less one of such scope, and cautioned against any broad reading of its limited, ***Garmon*** preemption decision. This sound, fact specific, ***Garmon***-based preemption ruling poses no question warranting this Court's review.

I. THE MINNESOTA COURT'S DECISION IS AN ENTIRELY SOUND AND UNEXCEPTIONAL *GARMON* PREEMPTION RULING.

The Minnesota Court of Appeals began the ***Garmon*** preemption analysis through which it decided this case by quoting the following passage from its own decision in ***Jara v. Buckbee-Mears Co.***, 469 N.W.2d 727, 729 (Minn. App. 1991), which accurately and succinctly summarized the foundational principles of ***Garmon*** preemption based on the exclusive jurisdiction of the NLRB:

> When an activity is arguably subject to section 7 or 8 of the National Labor Relations Act (NLRA), both the state and federal courts must defer to the exclusive competence of the National Labor Relations Board (NLRB) to avoid the danger of state interference with national policy. See *San Diego Building Trades Council*

> *v. Garmon*, 359 U.S. 236, 245 (1959). The party asserting preemption must show that the alleged activity is arguably protected or prohibited by the NLRA and that the NLRB reasonably could uphold the party's claim. See *International Longshoremen's Association v. Davis*, 476 U.S. 380, 395 (1986).

Pet. App. 21a. The lower court then elucidated the meaning of "arguably protected or prohibited by the NLRA" by quoting this Court's decision in ***International Longshoremen's Ass'n v. Davis***, as follows:

> The United States Supreme Court has addressed and defined "arguably" in deciding when an activity is "arguably protected or prohibited" stating:
>
> > If the word "arguably" is to mean anything, it must mean that the party claiming preemption is required to demonstrate that his case is one that the [NLRB] could legally decide in his favor. That is, a party asserting preemption must advance an interpretation of the Act that is not plainly contrary to its language and that has not been "authoritatively rejected" by the courts or the [NLRB]. The party must then put forth enough evidence to enable the court to find that the [NLRB] reasonably could uphold a claim based on such an interpretation.
> >
> > . . . .
> >
> > [T]hose claiming preemption must carry the burden of showing at least an arguable case before the jurisdiction of a state court will be ousted.
>
> *Int'l Longshoremen's Ass'n*, 476 U.S. at 395-96. The Supreme Court also noted that "a court first must decide whether there is an arguable case for preemption; if there is, it must defer to the [NLRB], and only if the [NLRB] decides that the conduct is not protected or prohibited may the court entertain the litigation." *Id.* at 397.

Pet. App. 21a-22a. With these preliminaries, the Minnesota court then turned to a discussion of ***Hartman Brothers***

Heating & Air Conditioning, Inc. v. NLRB, 280 F.3d 1110, 1112-13 (7th Cir. 2002); and ***Winn-Dixie Stores, Inc.***, 236 NLRB 1547, 1547, 1549 (1978), which recognized that §7 of the NLRA may still protect an employee who conceals his union status by misstating his employment history when seeking a job with a non-union employer, and that §8 of the Act prohibits the firing of such an employee upon discovery of such concealment if the firing is motivated by the employee's union status rather than the concealment of employment history as such. Pet. App. 22a-24a. On the basis of that review, the Minnesota court concluded:

> [The Defendants have] advanced an interpretation of the NLRA "that is not plainly contrary to its language and has not been 'authoritatively rejected' by the courts or the [NLRB]." . . . . The remaining issue then is whether [the Defendants] have "put forth enough evidence to enable [this] court to find that the [NLRB] reasonably could uphold a claim based on such an interpretation."

Pet. App. 24a [citations omitted]. As the final step in its analysis, the Minnesota court addressed that issue and reached its holding reasoning as follows:

> We first note that the parties dispute the reason Ouellette falsified his employment application and the basis for Wright Electric's termination of Ouellette. . . .
>
> But this court cannot serve as the fact finder. . . . Our sole task is to determine whether [the Defendants have] "put forth enough evidence to enable [this] court to find that the [NLRB] could reasonably uphold a claim based on such an interpretation." . . . . We believe that Appellants have shown, and Wright Electric admits, that Wright Electric has never been a signatory to any collective bargaining agreement with any labor organization. The record also shows that Ouellette was fired a few days after supervisors discovered that he had worked for union contractors in the past. Moreover, Ouellette's firing occurred a few days after Priem faxed

> a letter to Wright Electric and handdelivered a copy of the letter to Stavrum, informing him that Ouellette was a union member engaged in protected union-organizing activity during his non-working time. In addition, the record indicates that Ouellette's work was isfactory and that he had not been disciplined until he as fired. From this evidence, appellants have carried their "burden of showing at least an arguable case" that Wright Electric's claims are preempted by the NLRA because Ouellette was arguably fired due to his union status.

Pet. App. 24a-26a [citations omitted].

In sum, the Minnesota Court of Appeals reached its holding by applying the black letter law of ***Garmon*** preemption to the particular facts here which showed that Wright Electric's state court action concerned what is, in substance, ordinary unfair labor practice case. Its entirely sound and thoroughly ordinary preemption decision presents no issue warranting review by the Court.

II. THE MINNESOTA COURT MADE NO SUBSTANTIVE RULING ON THE SCOPE OR MEANING OF §7 OR §8 OF THE NATIONAL LABOR RELATIONS ACT.

The decision below does not raise the first "Question Presented for Review" the Petitioner tenders to this Court as follows:

> Whether the state court of appeals erred in ruling that the National Labor Relations Act creates a protected right of employee applicants to lie on their employment applications with regard to their qualifications, a ruling that conflicts with holdings of the federal courts and the National Labor Relations Board.

Pet. p. i [citations omitted], and which Petitioner advances as the main reason for granting review at Pet. pp. 7-13. Nor did

the lower court issue any ruling which presents the second "Question for Review" tendered by Petitioner as follows:

> Whether the state court of appeals erred in ruling that the NLRA preempts all state tort law claims by employers against employee applicants who lie on their employment applications with regard to their qualifications, a ruling that conflicts with numerous federal court holdings regarding the scope of federal labor law preemption of state laws.

Pet. p. i, and which Petitioner discusses as a secondary "Reason for Allowing the Writ" at Pet. pp. 13-17. The Minnesota Court of Appeals' decision addressed only one issue: whether, under ***Garmon*** and its progeny, the alleged conduct giving rise to this action falls within the exclusive primary jurisdiction of the NLRB or within the primary jurisdiction of the Minnesota courts. The lower court did not issue, or even purport to issue, any substantive ruling construing the National Labor Relations Act, much less one holding that the Act "creates a protected right of job applicants to lie on their employment applications with regard to their qualifications" or one holding "that the NLRA preempts all state law tort claims by employers against employees who lie on their employment applications with regard to their qualifications," much less "one which conflicts with the holdings of the federal courts and the National Labor Relations Board."

As noted above, the Minnesota court discussed decisional law construing the protection provided by §7 of the NLRA only in the context of its ***Garmon*** preemption analysis as follows:

> [Respondents] rely on two decisions in support of its position that the NLRA protects "salts" who conceal their union affiliation when applying for jobs with non-union employers . . . . *Winn-Dixie Stores, Inc.*, [236 NLRB 1547 (1978)] . . . [and] *Hartman Brothers*

> *Heating & Air Conditioning, Inc. v. NLRB*, [280 F.3d 1110 (7th Cir. 2002)] . . . .
>
> Based on the NLRB and Seventh Circuit decisions . . . we conclude that the [Respondents have] advanced an interpretation of the NLRA "that is not plainly contrary to its language and has not been 'authoritatively rejected' by the courts or the [NLRB]."

Pet. App. 22a-24a. The Minnesota court then reviewed the evidence bearing on Wright Electric's motivations in firing Ouellette and concluded:

> From this evidence, [Respondents] have carried their "burden of showing at least an arguable case" that Wright Electric's claims are preempted by the NLRA because Ouellette was arguably fired due to his union status.

Pet. App. 26a.

As the foregoing makes plain, the Minnesota court made no substantive ruling regarding the protections provided by §7 of the NLRA or the prohibitions contained in §8 of the Act. Instead, the lower court confined its inquiry to ascertaining the *arguable* protections and prohibitions of the NLRA, reflecting its sound understanding of ***Garmon***'s central holding: that the construction of the NLRA's substantive terms is reserved for the NLRB and the federal appellate court's exercising their jurisdiction on review under §10 of the Act.

Indeed, after reaching its holding, the Minnesota court took pains to emphasize the limited nature of its ruling. Ironically, the Petitioner takes the lower court's post-holding comments out of context and misrepresents that discussion as a holding that §7 of the NLRA substantively protects job applicants who lie about their qualifications and preempts all state regulation of such conduct on behalf of employers. Pet. pp. 5-7. After completing its ***Garmon*** analysis and holding that

"Wright Electric's claims are preempted because Ouellette was arguably fired due to his union status," the Minnesota court simply cautioned that:

> [T]he NLRB has held that "[e]ducational background, criminal record, and history of compensation claims are all factors which a potential employer may lawfully take into account in deciding whether to hire an applicant, and hence a discharge for falsification of information on such matters does not itself violate" the NLRA. *Winn-Dixie Stores, Inc.*, 236 N.L.R.B. at 1547. Similarly, common sense suggests that an employer should also be able to take into account problems or disciplinary measures that a past employer has had with the applicant, if such problems or disciplinary measures do not relate to the applicant's union affiliation . . . .
>
> But therein lies the rub. As the law now stands, an applicant/salt may permissibly falsify his application and thereby hide negative, relevant spects of his qualifications (even past misconduct), if the past misconduct with non-union employers happened to occur during the same time that the applicant/salt was also engaged in protected union activities. In such cases, we believe a salt has met the minimal burden of demonstrating that falsifying an application by omitting any reference to the employer in question is "arguably protected" under the NLRA. Until the NLRB or the United States Supreme Court addresses this anomaly, the law compels the result that we reach here today.

Pet. App. 26a-27a.

In short, the Petitioner's effort to transmute the Minnesota court's holding into a statement of substantive NLRA law rests solely on the lower court's cautionary *dicta*.

In fairness to the Minnesota Court of Appeals, Respondents note that its post-holding comments in this case contain none of the sweeping propositions attributed by the Petitioner's tendered "Questions for Review." The lower court

may fairly be read as saying that, under the NLRB's decisional law, as reviewed by the federal appellate courts, one cannot make even an arguable case that an employer is prohibited from firing an employee for falsifying information bearing on any legitimate qualification; but, that the NLRA does arguably protect a union member who falsifies his employment history to conceal union affiliation, even if doing so conceals past misconduct, if that employee is fired not for giving a false work history, but for his union membership and activity. The Minnesota court then notes that, until the decisional law is changed by the NLRB or the Supreme Court on review of an NLRB decision, it must reach this conclusion – a situation which it finds anomalous. In short, these closing comments by the lower court on which Petitioner leans so heavily are both innocuous and at several removes from the actual holding of its decision.

Because the Minnesota Court of Appeals' decision makes no substantive ruling construing the NLRA, it presents neither of the "Questions for Review" proposed by the Petitioner, nor any other question warranting this Court's review.

III. THE LOWER COURT'S DECISION COMPORTS WITH OTHER SETTLED LAW REGARDING NLRA PREEMPTION.

Having mischaracterized the Minnesota Court of Appeals' decision as one holding that "the NLRA preempts all state tort law claims by employers against employee applicants who lie on their employment applications with regard to their qualifications" (Pet. p. i), the Petitioner argues that this straw ruling conflicts with this Court's decisions in ***Belknap v. Hale***, 463 U.S. 491 (1983); and ***Sears, Roebuck & Co. v. San Diego Co. District Council of Carpenters***, 436 U.S. 180 (1978). The Minnesota court's much narrower, ***Garmon*** preemption holding is entirely consistent with both ***Belknap*** and ***Sears***.

Petitioner first misstates this Court's holding in ***Belknap*** as declaring that "state law claims of fraud were not preempted by the NLRA." (Pet. p. 14.) The Court actually held in ***Belknap*** that persons who had accepted employment during a strike on the basis of the employer's promise of "permanent" employment and then were immediately laid off on the strike's conclusion could sue on that promise for damages in state court, noting that such employer conduct "is of peripheral concern to the federal law [and] touches interests deeply rooted in local feeling and responsibility." 463 U.S. at 498. The ***Belknap*** Court then noted that preemption was particularly inappropriate because the NLRB could only address the question of whether the employer's offer of permanent employment to other workers infringed on the strikers' rights, and could not determine whether the employer had unlawfully broken its promise to the replacement workers. 463 U.S. at 510-11.

The behaviors at issue in this case—a union salt's omission of employers whose mention in his employment history would identify him as a union member to the non-union employer where he is seeking work, and the non-union employer's dismissal of the salt immediately after discovering his union membership—raise precisely the same sort of issues regarding the limits of acceptable conduct in advancing or resisting union organization which the NLRA places under the NLRB's primary jurisdiction. These issues concerning the balance of power between employers and employees in the context of union organizing touch few traditional concerns of local regulators. If the General Counsel had issued a complaint in this case, the NLRB would have determined whether Wright Electric actually and lawfully relied to its detriment on the employment history provided by Ouellette when it hired him and on his omissions from that history when it fired him, or whether Wright relied solely on the fact that that history disclosed only non-union prior employment and fired Ouellette because its managers discovered he was a

union member. Through this action, Wright Electric seeks to place these very same issues before a state court, in a textbook intrusion on the NLRB's exclusive jurisdiction.

As noted above, the Minnesota court made no holding concerning the much broader question of employers' general legal rights against employees who obtain their positions by materially misrepresenting their qualifications. However, even this much larger issue has such shallow roots in "local feeling and responsibility" that the Petitioner cannot cite a single decision from a court of record in any jurisdiction even recognizing an employer's cause of action for "resume fraud," much less awarding a remedy on such a cause.[3]

In sum, the Minnesota court's decision offers no conflict of any sort with this Court's decision in ***Belknap***.

Next, Petitioner argues that its action should avoid preemption under the rule in ***Sears, Roebuck & Co. v. San Diego Co. District Council of Carpenters***, 436 U.S. 180, 197 (1978), permitting state court proceedings when "the party who could have presented the [NLRA] protection issue to the NLRB has not done so and the other party to the dispute has no acceptable means of doing so." However, unlike the union in the ***Sears*** case, the Union immediately brought this matter to the NLRB by filing a charge with the NLRB alleging that Wright Electric terminated Ouellette because of his union activity, rather than any other alleged misconduct. If the Petitioner wished to bring tort claims against the Respondents based on that same set of events, it should have invited a complaint from the General Counsel and hoped to prevail before the Board on its claim that it actually relied on

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[3] The cases cited by the Petitioner stand only for the proposition that an employer may assert "resume fraud" as an affirmative defense to employee claims for unlawful termination. ***Sarvis v. Vermont State Colleges***, 772 A.2d 494 (Vt. 2001); and ***Crawford Rehabilitation Services, Inc. v. Weissman***, 938 P.2d 540, 549 (Colo. 1997).

Ouellette's alleged "resume fraud" as the basis for firing him. Had it done so, as the lower court noted, it would have been free to pursue this action. See, Pet. App. 27a.

Instead, Wright Electric chose to misrepresent its actual employment policies and practices during the General Counsel's investigation. The General Counsel's exercise of prosecutorial discretion (following Petitioner's misrepresentations) in deciding not to issue a complaint on the Union's charge does nothing to limit the preemptive reach of the Board's primary jurisdiction in this matter. ***San Diego Building Trades Council v. Garmon***, 359 U.S. at 245-46.

The lower court's decision results from the application of the very well-settled law of ***Garmon*** preemption to the facts of a matter which is, in the first instance, an unfair labor practice case. This matter presents no issue warranting the Court's review.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari in this matter should be denied.

Respectfully submitted,

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May 16, 2005

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IN THE

Supreme Court of the United States

WRIGHT ELECTRIC, INC.,
Petitioner,

v.

THOMAS A. OUELLETTE, INTERNATIONAL BROTHERHOOD ELECTRICAL WORKERS, LOCAL 292, AFL-CIO, AND MICHAEL J. PRIEM,
Respondents.

On Petition for Writ of Certiorari to the Minnesota Court of Appeals

BRIEF *AMICUS CURIAE* OF ASSOCIATED BUILDERS AND CONTRACTORS, INC., IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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BRIEF *AMICUS CURIAE* OF ASSOCIATED BUILDERS AND CONTRACTORS, INC., IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

INTEREST OF THE *AMICUS CURIAE* [1]

This brief is submitted on behalf of the Associated Builders and Contractors, Inc. ("ABC"), a national trade association

[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that no counsel for a party authored this brief in whole or in part, and no persons other than the *amicus curiae*, its members, or counsel, made a monetary contribution to the preparation or submission of this brief. This brief is filed with the written consent of the parties pursuant to Supreme Court Rule 37.3. Letters of consent are being filed with the Clerk of the Court simultaneously with the filing of this brief.

representing more than 23,000 individual employers, both union and non-union, who perform work in the construction industry. ABC actively represents the interests of its member-employers in a wide variety of labor and employment matters before the courts, the United States Congress, the Executive Branch and independent agencies of the federal government. ABC has participated as *amicus curiae* in numerous National Labor Relations Board ("NLRB") and court proceedings, including cases in this Court. *See, e.g., BE&K Construction Co. v. NLRB*, 536 U.S. 516 (2002); *Lechmere, Inc. v. NLRB*, 504 U.S. 527 (1992); *Town & Country Electric*, 309 NLRB 1250 (1992), *aff'd sub nom. NLRB v. Town & Country Electric Inc.*, 516 U.S. 85 (1995); and *FES, a Division of Thermo Power*, 331 NLRB 9 (2000), *supplemented*, 333 NLRB 66 (2001), *enforced*, 301 F.3d 83 (3d Cir. 2002).

Absent review and reversal of this case by the Court, ABC's member construction contractors and other employers will, as a result of the Minnesota state courts' misapplication of federal preemption under the National Labor Relations Act ("NLRA"), be denied a judicial remedy for violations of important state laws. Accordingly, ABC submits this brief *amicus curiae* to clarify the important distinctions between (1) the kind of union organizing activity commonly referred to as "salting" (where union agents who are "salts" seek employment on a non-union job site targeted for unionization), which is protected activity under the National Labor Relations Act; and (2) the unprotected "salting abuse" types of conduct present in this case. These distinctions are crucial to the analysis and determination of federal preemption under the NLRA, and were incorrectly applied by the state courts below, whose rulings are contrary not only to the determinations of the National Labor Relations Board in this case and in other like cases, but also to the seminal holding of this Court in *NLRB v. Town & Country Electric, Inc.*, 516 U.S. 85 (1995).

ABC member contractors are frequently the targets of both union "salting," as well as "salting abuses" that violate state laws. Although the NLRB and the courts have defined simple "salting" as a legitimate organizing tool under the NLRA, "salting abuse" extends well beyond such protected organizing activity. It consists primarily of myriad unlawful tactics whose aim is the weakening or destruction of targeted non-union employers.

Clearly, one form of "salting abuse" that is not protected by the NLRA are the state law violations at issue in the present case, i.e., making false and fraudulent statements on employment applications unrelated to union status, such as concealing the identity of prior employers or past job transgressions relating to their lack of qualifications for the jobs they claim to be seeking. Such forms of resume fraud are a serious problem for employers and have an adverse impact on the ability of employers to hire qualified workers. Federal law, certainly, does not protect attempts by employee applicants to engage in such activities. This is all the more nefarious where, as here, job applicants are not asked to reveal their status as union supporters or organizers. Accordingly, absent enforcement of state law protections of the type invoked by Wright Electric in this case, ABC's member construction contractors, as well as other employers, will be left without an adequate legal remedy to deter such conduct and thereby protect their businesses from economic harm and potential legal liability.

There is an additional legitimate public policy interest in protecting the latter employers, their employees, and the public from the consequences of fraudulent and falsified employment applications such as occurred in this case. For ABC's members, such false statements or intentional omissions of prior training, work experience, or work misconduct, could jeopardize the company's ability to perform government construction contacts that require as a precondition an accurate

account of employee job training and experience, could also result in future employer liability and penalties for negligent hiring or retention, and could expose employees and the public to unsafe work practices. Thus, a construction employer could be held vicariously liable for violations of federal or state safety and health laws resulting from the unsafe working practices of the "salt," as well as being subject to legal actions brought by customers and fellow employees for injuries sustained as a result of such practices.

STATEMENT OF THE CASE

Petitioner Wright Electric is a non-union electrical contractor headquartered in Plymouth, Minnesota. As Petitioner asserts, when Thomas A. Ouellette ("Ouellette") applied for a position with the Company, he made a series of false statements and deliberate omissions on his employment application relating directly to his qualifications for the position he was seeking. Thus, Ouellette concealed that he had previously performed electrical work without a permit in violation of state law, that he had resigned without notice from a prior employer with whom he claimed on his application to still be employed, that he had intentionally broken company materials at another previous workplace, and that he had engaged in other workplace misconduct. Additionally, Ouellette's employment application concealed the identity of five previous employers.

When Wright Electric learned of Ouellette's application fraud, it acted consistently with the Company's established policies and terminated him. In response, International Brotherhood of Electrical Workers, Local 292, AFL-CIO ("Local 292") filed an unfair labor practice charge with the National Labor Relations Board alleging that Ouellette had been terminated because of union organizing activities in violation of the NLRA. The Board's General Counsel nevertheless refused to issue a complaint and dismissed the union's charge, concluding that there was insufficient evidence to

find that Wright had terminated Ouellette for anything other than falsifying his employment application.

Subsequently, Wright Electric brought suit in Minnesota district court against Ouellette, Local 292, and the Local's business agent, Michael Priem, based on common law claims arising from Respondents' fraudulent acts, and seeking monetary and injunctive relief. Local 292 then filed new unfair labor practice charges with the NLRB, contending that the filing of Wright Electric's lawsuit violated the NLRA. These new charges were addressed by both the Board and the Eighth Circuit Court of Appeals, both of whom effectively allowed Wright Electric's state court lawsuit to proceed, with no finding of NLRA preemption as to Wright's state court fraud claims. *See Wright Elec., Inc. v. NLRB*, 200 F.3d 1162 (8th Cir. 1999).

Ultimately, the Minnesota district court denied Local 292's motion for summary judgment with respect to Wright Electric's state law fraud and related claims, holding that such claims were not preempted by the NLRA. The Minnesota Court of Appeals then reversed the lower court. *Wright Electric, Inc. v. Ouellette*, 686 N.W.2d 313 (Minn. Ct. App. 2004), *review denied*, No. A03-1683, 2004 Minn. LEXIS 814 (Minn. Dec. 14, 2004). It held that Wright's lawsuit was preempted because Ouellette's misrepresentations were "arguably protected" under the NLRA. In so concluding, the Appeals Court misapplied this Court's rulings in *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959), and *NLRB v. Town & Country Electric, Inc.*, 516 U.S. 85 (1995). Wright's petition for review to the Minnesota Supreme Court was subsequently denied. *Wright Electric, Inc. v. Ouellette*, 2004 Minn. LEXIS 814 (Minn. Dec. 14, 2004).

As we set forth below, the Minnesota Court of Appeals failed to give weight to this Court's controlling decisions that federal labor law preemption does not apply to state tort statutes of general application, particularly those laws that are

"deeply rooted in state common law and traditions." *See Belknap, Inc. v. Hale*, 463 U.S. 491 (1983); *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731 (1983); *Sears, Roebuck & Co. v. Carpenters*, 436 U.S. 180 (1978); *Farmer v. Carpenters*, 430 U.S. 290 (1977); *Linn v. Plant Guard Workers*, 383 U.S. 53 (1966). Instead, in what it acknowledged as an "anomaly," the Minnesota Appeals Court stated (686 N.W.2d at 325):

> As the law now stands, an applicant/salt may permissibly falsify his application and thereby hide negative, relevant aspects of his qualifications (even past misconduct), if the past misconduct with non-union employers happened to occur during the same time that the applicant/salt was also engaged in protected union activities. In such cases, we believe a salt has met the minimal burden of demonstrating that falsifying an application by omitting any reference to the employer in question is "arguably protected" under the NLRA. *Until the NLRB or the United States Supreme Court addresses this anomaly, the law compels the result that we reach here today.* (Emphasis added.)

Amicus curiae, in support of the petition herein, joins the Minnesota court in inviting this Court to resolve that "anomaly" by granting review and reversing the state courts' rulings for the reasons that follow.

REASONS FOR ALLOWING THE WRIT

I. THE STATE COURTS MISAPPLIED THE LAW OF FEDERAL PREEMPTION UNDER THE NATIONAL LABOR RELATIONS ACT AND THEREBY PRIVILEGED THE MAKING OF FALSE STATEMENTS ON EMPLOYMENT APPLICATIONS.

As noted above, the Minnesota state courts' decision in this case rests upon a misstatement of federal labor law that "an applicant/salt may permissibly falsify his application and

thereby hide negative, relevant aspects of his qualifications (even past misconduct), if the past misconduct with non-union employers happened to occur during the same time that the applicant/salt was also engaged in protected union activities." (686 N.W.2d at 325). Relying on an "arguably protected" analysis of federal preemption, the state courts ruled that the National Labor Relations Act, in effect, creates a "right to lie" about employment qualifications, and there-fore preempts state law to the contrary—an outcome that the court itself characterized as an "anomaly" calling for resolution by this Court. *(Id.)*

In fact, however, under the NLRA, there is no federally protected "right to lie" about employment qualifications, or to engage in common law fraud; and such fraud has never been privileged either by this Court or other federal courts, or by the National Labor Relations Board. We submit that the effect of the Minnesota courts' ruling is to immunize "salts" from legal proceedings arising from workplace abuses, thereby creating a preferred status of employment for salts elevated beyond that of ordinary employees. In fact, under that ruling, an employer could maintain a state court action for fraud against ordinary employees who falsify employment applications, but not against "salts." That result is not sanctioned by federal labor law.

Although this Court held in *NLRB v. Town & Country Electric, Inc.*, 516 U.S. 85 (1995), that union agents seeking employment with non-union contractors fall within the definition of "employees" under the NLRA and cannot therefore be discriminated against based upon their support for unionization, nothing in that decision immunizes union "salts" from disciplinary action or other remedies for workplace misconduct. To the contrary, the Court explicitly declared that such misconduct would ***not*** be protected by the NLRA, and that union activists lose the protections of the NLRA when they step outside the boundaries of legitimate organizing activities

and engage in destructive or otherwise unlawful behavior violating settled workplace norms. 516 U.S. at 96. *See also Hartman Brothers Heating v. NLRB*, 280 F.3d 1110 (7th Cir. 2002) (NLRA protection limited only to "a lie related *solely* to one's union affiliation or unionizing intentions rather than to one's fitness for the job. . . ." and salt's conduct protected only if "the lie concerns merely his status as a salt, union organizer, or union supporter and not his qualifications for the job." 280 F.3d at 1112-13); *Winn-Dixie Stores, Inc.*, 236 NLRB No. 204 (1978) (omission of "union employment" was distinguishable from the omission or concealment of facts an employer is entitled to consider in its hiring decisions, in which case such falsifications are not protected by the NLRA); *Micrometl Corp.*, 333 NLRB 1133 (2001) (upholding discharge of union organizer for falsely identifying past employer on employment application).

In its decision immunizing "salts" from state common law liability for fraud, the Minnesota courts also rely on an overly expansive interpretation of *Garmon* preemption. For it is clear that under *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959), state law will be preempted only if it regulates conduct that is "clearly" or, under more limited circumstances, "arguably" protected by the National Labor Relations Act. Further, *Garmon* preemption is disfavored where the state law reflects "a substantial interest in regulation of the conduct at issue . . . and does not threaten undue interference with the federal regulatory scheme." *See Belknap, Inc. v. Hale*, 463 U.S. 491 (1983) (no preemption of state fraud claim).

As this Court stated in *Belknap*, *supra*, there is no *Garmon* preemption, and state law and state causes of action should be maintained, "if the behavior to be regulated is behavior that is of only peripheral concern to the federal law or touches interests deeply rooted in local feeling and responsibility." 463 U.S. at 498. Accordingly, the "critical inquiry" in deciding

whether federal labor law preempts such deeply rooted state law claims is "whether the controversy presented to the state court is identical to or different from that which could have been, but was not, presented to the National Labor Relations Board." *Id.* The Court in *Belknap* emphasized (463 U.S. at 511):

> [The state] surely has a substantial interest in protecting its citizens from misrepresentations that have caused them grievous harm. It is no less true here than it was in *Linn v. Plant Guard Workers, supra*, at 63, that "the injury" remedied by the state law "has no relevance to the Board's function" and that "the Board can award no damages, impose no penalty, or give any other relief to the plaintiffs in this case. The state interests involved in this case clearly outweigh any possible interference with the Board's function that may result from permitting the action for misrepresentation to proceed.

Of course, the NLRA provides no affirmative rights or remedies to employers for fraudulent conduct of union agents or members in falsifying employment applications. However, absent reversal by this Court, the state court decision in the present case will deny efforts by employers to seek redress under state law for unlawful union-sponsored misconduct. The Minnesota courts' ruling on preemption in this case likewise conflicts with the strong presumption, as repeatedly emphasized by this Court, that in certain matters "Congress did not intend to displace state law" *(Building Construction Trades Council v. Associated Builders and Contractors of Massachusetts/Rhode Island (Boston Harbor)*, 507 U.S. 218, 224 (1993)), and that courts should be "reluctant to infer preemption." *See also, Metro. Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 757 (1985); *Motor Coach Employees v. Lockridge*, 403 U.S. 274, 289 (1971); *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 21 (1987). This Court has further instructed that courts should be particularly reluctant to infer preemption when the state law at issue, as here, deals with

an area traditionally controlled by state law. *De Buono v. NYSAILA Medical and Clinical Servs. Fund*, 520 U.S. 806 (1997); *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645 (1995).

It is, in fact, instructive that the Minnesota courts have demonstrated a substantial interest, and a deeply rooted state tradition, for protecting its citizens, such as Petitioner, who have been victimized by fraud. *See N.H. v. Caritas Family Services*, 488 N.W.2d 282, 289 (Minn. 1992); *Florenzano v. Olson*, 387 N.W.2d 168, n.4 (Minn. 1986); *Davis v. Re-Trac Manufacturing Corp.*, 149 N.W.2d 37 (Minn. 1967).

Accordingly, it is truly an "anomaly" for the Minnesota courts to immunize fraudulent conduct which, as we argue below, is harmful to its citizens. The anomaly is based on the state courts' misapplication of this Court's ruling in *Town & Country* and on an overly expansive "arguably protected" analysis of federal preemption under *Garmon*

In sum, the Minnesota courts' finding of labor law preemption in the present case directly conflicts with the decisions of this Court, as well as numerous other federal courts, and should therefore be reversed.

II. THE ISSUES PRESENTED BY THIS CASE ARE OF GREAT PUBLIC IMPORTANCE IN THAT EMPLOYERS WILL BE EFFECTIVELY LEFT DEFENSELESS AGAINST RESUME FRAUD AND ITS CONSEQUENCES IF THE MINNESOTA COURTS' RULINGS ARE ALLOWED TO STAND.

The particular type of salting abuse here at issue, lying on an employment application, is frequently characterized as "resume fraud"—a type of fraud that has reached epidemic proportions in the business world and is having a serious adverse impact on the ability of employers to hire qualified workers. Until the Minnesota courts' decision in the present

case, federal law has never been held to protect concealment by employee applicants of the identity of prior employers or past job transgressions relating to their qualifications; and this is certainly true where the applicants had not been asked to reveal their status as union supporters or organizers. Indeed, as noted earlier, federal law does not provide a remedy for falsification of employment applications or of resume fraud at all, leaving enforcement of such fraud claims to the states. Accordingly, in the absence of the enforcement of state law protections of the type invoked by Wright Electric in this case, employers will be unable to protect their businesses, their employees and customers from potentially serious harm.

Resume fraud has been recently described as a huge and growing problem that is "abundant"[2] and "rampant."[3] One recent report estimates that over 40 percent of all job application forms contain lies or discrepancies of some kind; and thirteen percent of people misrepresent negative aspects of their previous jobs relating to work habits, attendance, behavior, termination or other unfavorable conduct.[4] Another study, which likewise found that one third of all applicants commit resume fraud, determined that nearly half of such applicants had past performance problems or were not able to meet job expectations.[5]

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[2] "Many Resumes Are Misleading," SHRM Forum (2005), http://www.shrm.org/ema/library-published/nonIC/CMS_006087.asp; *see also* Pamela Babcock, "Spotting Lies," 48 HR Magazine No. 10 (Oct. 2003) (hiring lying applicants can be "an expensive mistake").

[3] Jane Ritter "The Lying Game: A Matter of Fact Approach to Resume Fraud," The Galt Global Review (Nov. 19, 2002), www.globalreview.com/careers/lying_game2.html.

[4] "Spotting Lies," *supra* n.2.

[5] "One-third Canadians Lied In Job Resumes Survey" Reuters (Jan. 19, 2000), www.infocheck.ca/news.html.

In order to protect their ability to hire qualified applicants, and whether or not the issue arises in the context of "salting" activity, employers must be able to investigate and take action against those who commit resume fraud. Indeed, employers are routinely advised by human resource experts that the only way to prevent such fraud is to thoroughly check all employment references on employment applications.[6] In this regard, the right of employers to take appropriate action against applicants or employees who commit resume fraud, once the fraud is discovered, has been repeatedly upheld in state courts across the country. *See, e.g., Sarvis v. Vermont State Colleges*, 772 A.2d 494 (Vt. 2001); *Crawford Rehabilitation Services, Inc. v. Weissman*, 938 P.2d 540, 549 (Colo. 1997).

Public policy should neither encourage nor reward deceitful conduct by applicants in the employment process, especially where, as here, an employer has a legitimate expectation to be truthfully informed by applicants about their qualifications for employment. Employers are exposed to vicarious liability for their employees' workplace misconduct, such as sexual and racial harassment, workplace violence, and occupational safety and health violations affecting co-workers and customers. Moreover, in an era of heightened security concerns and reference checks, it is ironic that the effect of the Minnesota courts' decision could be to encourage applicants to withhold their employment history and past transgressions with impunity, based solely on the assertion that by posing as "salts" they are immunized from common law consequences.

We submit that federal law should be clear that employers like Wright Electric are entitled to seek relief in state court from employee applicants' intentional fraud and unlawful misconduct. Indeed, other than the state courts, employers who are confronted with resume fraud have nowhere else to

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[6] *See* "Many Resumes Are Misleading," *supra* n.2.

turn for redress. For it is the state courts, not the federal courts, that traditionally address and remedy tortuous conduct. The Minnesota Court of Appeals correctly referred to its decision as an "anomaly;" indeed, that court's decision not only has the "anomalous" result of encouraging intentional fraud in the employment application process, but it also provides no acceptable justification for radically changing the normal balance of federalism.

CONCLUSION

The decision of the Minnesota Court of Appeals, and the denial of review of that decision by the Minnesota Supreme Court, directly conflict with rulings of this Court and with numerous other federal court decisions on issues of great public importance. For each of the reasons stated above, as well as those advanced by the Petitioner, the Court should grant the writ of certiorari and reverse the decision below.

Respectfully submitted,

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